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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 755

JOHN CLAYTON CRIDLEBAUGH,
Trading as Marvel Company,
Petitioner,

vs.

MAURICE L. RUDOLPH,
Trading as Rudolph Poultry Equipment Company,
Respondent.

Petition for Review on Writ of Certiorari and Brief in Support

To the United States Circuit Court of Appeals for the Third Circuit

JAMES M. NAYLOR,
THEODORE H. LASSAGNE,
Counsel for Petitioner,

RICHARD J. COOK,
Of Counsel.

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No.....

JOHN CLAYTON CRIDLEBAUGH,
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vs.

MAURICE L. RUDOLPH,
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Respondent.

Petition for Review on Writ of Certiorari

To the United States Circuit Court of Appeals for the Third Circuit

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

This petition of John Clayton Cridlebaugh, trading as Marvel Company, respectfully prays that, in accordance with the provisions of the United States Code, Title 28, Section 347 (a), the United States Circuit Court of Appeals for the Third Circuit be required by writ of certiorari issued by the Supreme Court of the United

States, to certify to it for determination, the above-identified case in which the decision of the said circuit court of appeals was rendered on November 20, 1942.

SUMMARY STATEMENT OF MATTER INVOLVED

This petition presents questions relative to the validity of Jones Reissue patent 19,562, Cridlebaugh patent 2,079,107, and the validity of the word "Specs" as a common law trade mark, and the test of infringement to be applied thereto.

A. The Questions as to Validity of the Patents

1. The first question which petitioner asks to have reviewed and determined by this Court is whether in the absence of a challenge of validity by either of the parties to a suit for patent infringement, a court may nevertheless pass on that question.

(a) Assuming the primary question be answered in the affirmative, does the Jones Reissue patent No. 19,562 represent a patentable advance over the prior art?

(b) Assuming the primary question be answered in the affirmative, does the Cridlebaugh patent No. 2,079,107 represent a patentable advance over prior art?

The respondent, Rudolph, frankly conceded at the trial of the cause that he did not rely on any patent or prior use which could justify a contention that the claims of either of the patents (Jones Reissue 19,562 or Cridlebaugh 2,079,107) were anticipated. The Circuit Court of Appeals took the position that the fact that a defending

party to an infringement suit seeks to obviate the question of patentability of the disclosure involved does exclude that issue, that it inheres none the less in the charge of infringement, and held both patents anticipated by certain prior art patents.

2. The second question which petitioner asks to have reviewed and determined by this Court is whether the rule of *Permutit Company v. Grover Corporation*, 52 S. Ct. 53; 413 O. G. 1099; 11 Pat. Q. 118, operates to bar an applicant from claiming operational, as distinguished from structural, characteristics shown in his drawing but not specifically described in his specification.

The Circuit Court of Appeals took the position that rotary action of a certain securing member was neither "specified nor claimed" in the original Jones application despite the fact that such operational characteristic was clearly shown in the original drawing.

3. The third question which petitioner asks to have reviewed and determined by this Court is whether the introduction into a reissue claim of an operational, as distinguished from a structural characteristic, shown in the original drawings but not specifically described in the specification, makes the reissue claim one for a different invention than the original patent?

The Circuit Court of Appeals took the position that rotary action of a certain securing member in the patented device was neither "specified nor claimed" in the original Jones application despite the fact that such operational characteristic was clearly shown in the original Jones drawing, and construed the matter introduced by

the reissue claims as "an idea antagonistic to the disclosure of the original application", holding that the statute did not permit such procedure.

4. The fourth question which petitioner asks to have reviewed and determined by this Court is whether, as a matter of law, communication by an assignee of an interest, insufficient to enable him to control prosecution of an application for letters patent, to the inventor of the said assignee's belief of inadequacy of protection afforded by claims, prior to the issuance of an original patent, will bar subsequent, timely reissuance of the patent.

Jacob Jones, petitioner's assignor, filed application for letters patent on a Mask for Fowls on January 7, 1933. During the pendency of that application petitioner acquired a 49% interest in the invention. Prior to the grant of the original patent petitioner acquired a belief that broader claims than those asserted by Jones should be applied for and so informed Jones. The original patent issued on June 12, 1934 (1,962,395), on the basis of the narrow claims asserted by Jones. On July 12, 1934, pursuant to R-S 4916, U. S. C., Title 35, Sec. 64, Jones applied for reissue of the original patent to obtain broader claims and the reissue patent (19,562) was granted on May 7, 1935.

The Circuit Court of Appeals held it was difficult to see how Jones was in a position to make the requisite oath to a reissue application, viz., that the matter omitted from the original application was omitted therefrom through "inadvertence, accident or mistake".

B. The Validity of the Word "Specs" as a Common Law Trade Mark and the Test of Infringement to be Applied Thereto.

1. The fifth question which petitioner asks to have reviewed and determined by this Court is whether the word "Specs", as applied to Masks for Fowls, i.e., mechanical devices fitted on a chicken's beak and designed to partially obstruct forward vision on a horizontal plane as a means of preventing picking, is susceptible of exclusive appropriation as a trade mark at common law.

The Circuit Court of Appeals held that the word "Specs" is but a "figurative description" of the plaintiff's article of manufacture and does not grow out of either the origin or ownership of the goods, and that petitioner is not entitled to the exclusive use of the word or its synonyms.

2. The sixth question which petitioner asks to have reviewed and determined by this Court is whether having held that a plaintiff in a suit for infringement of a common law trade mark failed to establish a case of trade mark infringement, the court should nevertheless adjudicate the validity of the mark.

The Circuit Court of Appeals having held that the burden is on the one complaining to show by a fair preponderance of the evidence that the ordinary run of purchasers, giving that attention which such persons usually give to the buying of articles of the character involved, would likely be deceived, and that petitioner has failed to make out a case by a fair preponderance of the evidence, nevertheless declared the word "Specs" a "figurative description" of the petitioner's article and that peti-

tioner was not entitled to the exclusive use of the word or its synonyms.

3. The seventh question which petitioner asks to have reviewed and determined by this Court is whether in a suit for infringement of a common law trade mark it is sufficient for the plaintiff to show that a likelihood of confusion exists as distinguished from a showing that actual confusion has occurred.

The Circuit Court of Appeals, by its ruling, requires proof of actual confusion in trade as distinguished from showing a likelihood of confusion.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

This case presents questions of general importance relating to the interpretation of the patent laws and the law applicable to common law trade marks.

The United States District Court for the District of New Jersey held the Jones Reissue patent No. 19,562 and Cridlebaugh patent No. 2,079,107 both valid and infringed; held the trade mark "Specs" valid and infringed by the respondent's use of the synonym "Goggles", and held that the respondent had been guilty of unfair competition in his use of the word "Goggles" and his methods of advertising (decision reported at 40 F. S. 393).

The Circuit Court of Appeals in reversing the decision of the District Court, on all grounds, has decided the several questions presented in a manner which is submitted to be in conflict with the principles enunciated in relevant decisions of this Court.

The judicial discretion of this Court is invoked because of the general importance of the questions presented by this case, and by the disastrous effect of the decision of the Circuit Court of Appeals on the business of the petitioner. Additionally, petitioner represents that there is at present no conflict between decision of Circuit Courts relative to the subject matter hereof and there is no immediate prospect of such conflict, because, as petitioner represents, the respondent is petitioner's only competitor in the manufacture and sale of devices believed by petitioner to infringe the patents in suit and that consequently, further litigation is improbable.

> *Mackay Radio and Telegraph Co., Inc., v. Radio Corporation of America,* 306 U. S. 86, 40 U. S. P. Q. 199.

In cases involving an interpretation of the patent laws this Court has heretofore assumed jurisdiction for the purpose of review even in the absence of such conflict *(Exhibit Supply Co. v. Ace Patents Corporation,* 315 U. S. 126, 52 U. S. P. Q. 275).

Additionally, this Court has granted certiorari where the descriptive character of a trade mark was deemed of importance *(Armstrong Paint and Varnish Works v. Nu-Enamel Corp.,* 305 U. S. 315, 39 U. S. P. Q. 402), and where the decision is in conflict with decisions in other Circuit Courts of Appeals *(Beech-Nut Packing Co. v. P. Lorillard Co.,* 273 U. S. 629).

In so far as the decision of the Circuit Court of Appeals holds the word "Specs" invalid as a common law trade mark it is in conflict with the weight of authority as

shown by the decision of the Fourth Circuit Court of Appeals in *W. G. Reardon Laboratories, Inc. v. B & B Exterminators, Inc., et al.*, 71 F. (2d) 515 (holding "Mouse Seed" valid for rat poison); by the decision of the Seventh Circuit Court of Appeals in *Sierra Chemical Co. v. Berettini*, 33 F. (2d) 397 (holding "Rain Water Crystals" valid for a water softening compound); and by the decision of the Seventh Circuit Court of Appeals in *W. F. Burns Co. v. Automatic Recording Safe Co.*, 241 F. R. 472 (holding "Teller" valid for Safes).

In holding the reissue and original patents invalid, and the trade mark invalid and not infringed, the effect of the decision of the Circuit Court of Appeals will be to destroy the business of petitioner. Petitioner is shown by the evidence in the case to be engaged solely in the manufacture and sale of anti-picking devices for poultry, the articles forming the subject matter of the patent in suit and to be applying the trade mark "Specs" to those goods alone. Petitioner respectfully represents that it would be a miscarriage of justice if his business were completely destroyed by a decision based solely upon such an indefensible interpretation of the patent and trade mark laws.

The articles forming the subject matter of the patents in suit are Masks for Fowls. Specifically, the devices are blinders adapted to be attached to a chicken's beak to partially obstruct its forward vision on a horizontal plane as a means of preventing picking and, more particularly, cannibalism in poultry flocks. The problem solved by the devices of the patents in suit has been one of long standing and has occasioned great losses to the farmers, it being

demonstrable that the picking habit is contagious among members of a flock. The devices of the patents in suit are effective because they restrict the chicken's forward vision in a plane precluding cannibalistic tendencies while at the same time avoiding interference with normal nesting, feeding and drinking habits. The masks have been publicized by the U. S. Department of Agriculture and adopted universally by poultrymen and experimental poultry farms, because nothing in the prior art has approached the problem in the same way, a fact testified to by respondent's categorical withdrawal, by his statements during the trial, of any and all defenses with respect to anticipation pleaded in his answer.

Considering the stress of the times with respect to increased production of food supplies and the needless losses thereof prevented by the devices of the patents in suit, it is submitted that the subject matter hereof is of critical importance and the inventors, and those claiming under them, should not, except in a clear case, be deprived of their just rewards for such a meritorious contribution.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a transcript of the record and proceedings herein; and that judgment of the said Circuit Court of Appeals for the Third Circuit be reversed by this Honorable Court, and that your petitioner have such other and further relief

in the premises as to this Honorable Court may seem meet and just.

JAMES M. NAYLOR,
THEODORE H. LASSAGNE,
Counsel for Petitioner.

RICHARD J. COOK
Of Counsel.